UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	*)*	
	)	
v.	*)*	*Criminal No. 97-34-P-H*
	)	*(Civil No. 99-255-P-H)*
DAVID HARRIS,	*)*	
	)	
Defendant	*)*	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

David Harris, appearing *pro se*, moves this court to vacate, set aside or correct his sentence on several grounds pursuant to 28 U.S.C. § 2255. Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion") (Docket No. 14); Addendum to 2255 Motion ("Addendum") (Docket No. 17). The government responds *inter alia* that Harris's motion is untimely. Government's Response to Motion To Vacate, etc. (Docket No. 22) at 8-11. I agree and accordingly recommend that the motion be denied.

I. Background

On July 14, 1997 Harris waived indictment and was prosecuted by information on charges of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) and use of a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. §§ 924(c) and 2. Waiver of Indictment (Docket No. 1); Information (Docket No. 2). Harris entered a guilty plea the same day. Transcript of Proceedings Before the Hon. D. Brock Hornby on July 14, 1997

(Docket No. 20) at 9-10. Judgment against Harris was entered on the docket on October 30, 1997, with Harris receiving consecutive sentences of eighteen months on the possession charge and sixty months on the use charge. Judgment in a Criminal Case ("Judgment") (Docket No. 9) at 1-2. Inasmuch as appears from the docket, neither Harris nor the government filed a notice of appeal.

On July 30, 1999 Harris filed the instant motion by depositing it with prison officials for forwarding to this court. Certificate of Service attached to Motion.[1] He alleges three grounds for relief: (i) that the one-year statute of limitations on collateral review would not run until he received exculpatory material sought under the Freedom of Information Act ("FOIA"); (ii) that he was rendered ineffective assistance of counsel and (iii) that a Supreme Court case, *Bailey v. United States*, 516 U.S. 137 (1995), impacted his sentence. Motion at 5. He also alleged by way of addendum that he had newly discovered that he had inadvertently pleaded guilty to a crime he did not commit. *See generally* Addendum.

II. Discussion

A motion must be filed pursuant to 28 U.S.C. § 2255 within one year from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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[1]The First Circuit recently clarified that a *pro se* prisoner's section 2255 or 2254 motion should be deemed filed as of the date deposited in the prison's internal mail system provided the prisoner uses, if available, the prison's system for recording legal mail. *Morales-Rivera v. United States*, 184 F.3d 109, 109 (1st Cir. 1999).

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

Because neither Harris nor the government appealed, his judgment of conviction became final as of close of business on Monday, November 10, 1997. *See* Fed. R. App. P. 4(b)(1)(A) (criminal defendant must file notice of appeal within ten days after later of entry of judgment or order being appealed or filing of government's notice of appeal); Fed. R. App. P. 26(a) (noting in relevant part that in computing time one excludes day of act that begins period and includes last day of period unless a Saturday, Sunday, legal holiday or day on which clerk's office inaccessible); *Kapral v. United States*, 166 F.3d 565, 577 (3rd Cir. 1999) (defendant's conviction becomes final, and section 2255 statute of limitations begins to run, on date on which time for filing appeal expires). Harris's section 2255 motion hence should have been filed by November 10, 1998 absent an excuse falling within any of the three enumerated exceptions.[2] Harris presents no such cognizable excuse.

Harris intimates that the filing of his motion was delayed by governmental action — namely, denial of his request for trial transcripts and lack of response to his FOIA requests. Memorandum of Law Supporting Section 2255 Motion ("Memorandum") (Docket No. 14) at 2; Memorandum ("Reply") (Docket No. 23) at 2-3. Denial of a request for a trial transcript does not constitute sufficient excuse to toll the statute of limitations. *See, e.g., Fadayiro v. United States*, 30 F. Supp.2d

[2]Harris does not argue, nor do I discern, any basis upon which — apart from the statutorily enumerated exceptions — the one-year limitations period could be equitably tolled. *See Calderon v. United States Dist. Court*, 128 F.3d 1283, 1288-89 (9th Cir.1997), *overruled on other grounds*, 163 F.3d 530 (9th Cir.1998) (although equitable tolling unavailable in most cases, extensions of time granted if "extraordinary circumstances" beyond prisoner's control render filing of timely petition impossible).

772, 779-80 (D.N.J. 1998). A prisoner is not entitled to a free transcript as a matter of right. *See, e.g., id.* at 780. Moreover, Harris, by virtue of his participation in the proceedings, should have been put on notice of possible bases for a section 2255 motion arising from the contents of those transcripts. *See, e.g., Andiarena v. United States,* 967 F.2d 715, 718-19 (1st Cir. 1992) (despite attempt to excuse delay resulting from lack of transcripts, "the factual and legal basis underlying each of these claims was obviously apparent at the time of trial").

A delayed receipt of exculpatory FOIA information certainly could constitute a governmental impediment justifying extension of the statute of limitations. *See, e.g., Edmond v. United States Attorney*, 959 F. Supp. 1, 3-4 (D.D.C. 1997). However, Harris's requests to date have yielded no exculpatory information. Reply at 2-3. Accordingly no "impediment" has been "removed," and nothing has happened that would trigger the running of a new one-year limitations period. *Compare, e.g., Edmond*, 959 F. Supp. at 4 ("if Plaintiff is claiming that the government is holding exculpatory material, the one year limitation would not begin until the Plaintiff receives that evidence.") (footnote omitted). Harris possessed (or should have possessed) the knowledge to assert the substantive bases for the instant motion (ineffective assistance of counsel and the impact of a 1995 Supreme Court case) prior to making his FOIA requests.

Turning to the second enumerated exception, Harris's claims do not depend on the assertion of any right "newly recognized" by the Supreme Court. He relies on Supreme Court cases decided well prior to his October 30, 1997 judgment. Motion at 5 (citing *Bailey*); Memorandum at 4 (citing *Smith v. United States*, 508 U.S. 223 (1993)); Addendum at 3 (citing *Bailey*).

Nor, finally, does Harris demonstrate that the one-year statute of limitations should run from "the date on which the facts supporting the claim or claims presented could have been discovered

through the exercise of due diligence." Neither of the two substantive claims presented is buttressed by information gleaned from either the FOIA requests or the transcripts. Thus, the lack of these materials should not have delayed the filing of the instant motion. Harris moreover did not exercise due diligence in making his FOIA requests, to which he did not turn his attention until nearly six months after the default one-year statute of limitations had expired. *See* Memorandum at 2 (requests made from April through July 1999). Harris finally claims in his Addendum that he recently discovered that he had inadvertently pleaded guilty to a crime he did not commit. Even assuming *arguendo* that this were so, he essentially seeks to excuse his delay based on ignorance of the law.[3] Such ignorance is not tantamount to an unawareness of facts that could have been discovered through the exercise of due diligence. *See, e.g, Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999) ("ignorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing.") (footnote omitted).

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without prejudice.

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[3]With respect to the charge of use of a firearm in a drug-trafficking crime, Harris was sentenced pursuant to 18 U.S.C. §§ 924(c) and 2. Judgment at 1. Harris argues that he discovered that 18 U.S.C. § 924(c)(2) pertains to "carrying" rather than "use" of a firearm and that he was never convicted of a drug offense. Addendum at 1. Section 924(c)(2) defines the term "drug trafficking crime"; it does not distinguish "carrying" from "use" of a firearm. Section 924(c)(1), as in effect at the time of the Judgment, provided in relevant part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . ." Historical and Statutory Notes, 1998 Amendments, to 18 U.S.C. § 924. Thus, section 924(c), pursuant to which Harris was sentenced, criminalized both the use and carrying of a firearm and required merely that a person be subject to prosecution for (not convicted of) a drug trafficking crime.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 1st day of November, 1999.

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David M. Cohen
United States Magistrate Judge